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In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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QUESTION PRESENTED

Whether Section 27 of the Federal Power Act, 16 U.S.C. 821, reserves to the States the power to impose minimum in-stream water flow requirements on a hydroelectric project that are inconsistent with those specified in a license issued by the Federal Energy Regulatory Commission.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	1
Summary of argument	6
Argument:	
I. Section 27 does not reserve authority to the States to veto the exercise of the Commission's authority to determine whether and on what terms a hydropower project would represent an appropriate use of water resources	9
A. *First Iowa* is controlling with respect to the question presented by this case	11
B. *First Iowa* is fully justified by the language of Section 27 and its place in the statutory scheme	14
C. No intervening event would justify overruling *First Iowa*	22
D. The background and legislative history of the Federal Power Act do not provide any basis for overruling *First Iowa*	30
II. The California Water Board's minimum flow requirements do not constitute a proprietary right under California law, and are inconsistent with, and therefore preempted by, the Commission's exercise of licensing authority	41
A. California does not recognize a property right to in-stream flows for the purpose of protecting fish	42
B. California's in-stream flow requirement conflicts with the federal license and is thus superseded	43
Conclusion	48
Statutory appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Alabama Power Co. v. *Gulf Power Co.*, 283 F. 606 (M.D. Ala. 1922) 16

Allegheny Electric Coop., 48 F.E.R.C. ¶ 61,363 (1989) 19

American Paper Institute v. *American Electric Power Service Corp.*, 461 U.S. 402 (1983) 21

Askew v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973) 46

California v. *Oroville-Wyandotte Irrigation Dist.*, 411 F. Supp. 361 (E.D. Cal. 1975), aff'd, 536 F.2d 304 (9th Cir.), cert. denied, 429 U.S. 922 (1976) 24

California v. *United States*, 438 U.S. 645 (1978) ... 5, 6, 8, 22, 26, 27, 28, 29, 34

California Coastal Comm'n v. *Granite Rock Co.*, 480 U.S. 572 (1987) 43, 45

California Trout, Inc. v. *State Water Resources Control Board*, 90 Cal. App. 3d 816, 153 Cal. Rptr. 672 (1979) 42

Chemehuevi Tribe of Indians v. *FPC*, 489 F.2d 1207 (D.C. Cir. 1973), rev'd, 420 U.S. 395 (1975) 33

Chicago & N.W. Transportation Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) 20

City of Chicago v. *Atchison T. & S.F.R.R.*, 357 U.S. 77 (1958) 24

City of Jackson, Ohio, 48 F.E.R.C. ¶ 61,355 (1989) 19

City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958) 18, 21, 24

City of Tacoma v. *Taxpayers of Tacoma*, 43 Wash. 2d 468, 262 P.2d 214 (1953) 24

Cummings v. *Chicago*, 188 U.S. 410 (1903) 45

de Rahm v. *Diamond*, 32 N.Y.2d 34, 295 N.E.2d 763 (1973) 24

East Bay Municipal Utility District, 1 F.P.C. 12 (1932) 47

Cases – Continued: Page

Escondido Mutual Water Co. v. *LaJolla Band of Mission Indians*, 466 U.S. 765 (1984) 24, 47

FERC v. *Mississippi*, 456 U.S. 742 (1982) 30

FPC v. *Idaho Power Co.*, 344 U.S. 17 (1952) 20

FPC v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954) 16, 20, 32

FPC v. *Oregon*, 349 U.S. 435 (1955) 23, 31

FPC v. *Tuscarora Indian Nation*, 363 U.S. 99 (1960) 17

FPC v. *Union Electric Co.*, 381 U.S. 90 (1965) 17, 18, 31, 48

Fidelity Federal Savings & Loan Ass'n v. *De La Cuesta*, 458 U.S. 141 (1982) 46

First Iowa Hydro-Elec. Coop. v. *FPC*, 328 U.S. 152 (1946) ..... *passim*

Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 43, 46

Fullerton v. *California State Water Resources Board*, 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1979) 42

Garcia v. *United States*, 469 U.S. 70 (1984) 15

Henry Ford & Son, Inc. v. *Little Falls Fibre Co.*, 280 U.S. 369 (1930) 20

Hillsborough County v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985) 43, 44, 45

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 43

Holyoke Water Power Co.:

42 F.E.R.C. ¶ 62,166 (1988) 19

42 F.E.R.C. ¶ 62,343 (1988) 19

Huron Portland Cement Co. v. *City of Detroit*, 362 U.S. 440 (1960) 46

International Paper Co. v. *Ouellette*, 479 U.S. 481 (1987) 17

Kake v. *Egan*, 369 U.S. 60 (1962) 46

Kelly v. *Robinson*, 479 U.S. 36 (1986) 17

Cases – Continued: Page

Mansell v. *Mansell*, 109 S. Ct. 2023 (1989) 17
Mega Renewables v. *County of Shasta*, 644 F. Supp. 491 (E.D. Cal. 1986) 24
National Fuel Gas Supply Corp. v. *Public Service Comm'n*, No. 89-7458 (2d Cir. Jan. 24, 1990) 24
New England Power Co. v. *New Hampshire*, 455 U.S. 331 (1982) 24
New England Power Co., 5 F.E.R.C. ¶ 61,019 (1978) 19
Noah Corp., 48 F.E.R.C. ¶ 61,354 (1989) 19
Offshore Logistics, Inc. v. *Tallentire*, 477 U.S. 207 (1986) 17
Oregon v. *FPC*, 211 F.2d 347 (9th Cir. 1954) 23
Oregon v. *Idaho Power Co.*, 211 Ore. 284, 312 P.2d 583 (1957) 24
P.U.D. No. 1 of Chelan Co., Wash.:
34 F.E.R.C. ¶ 63,044 (1986) 19
46 F.E.R.C. ¶ 61,033 (1989) 19
Pacific Gas & Electric Co. v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983) 24, 44, 45
Patterson v. *McLean Credit Union*, 109 S. Ct. 2363 (1989) 22, 30
Pennsylvania Dep't of Environmental Resources v. *FERC*, 868 F.2d 592 (3d Cir. 1989) 24
Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987) 17
Power Authority of the State of New York, 12 F.P.C. 172 (1953) 19
Rice v. *Board of Trade*, 331 U.S. 247 (1947) 24
Rice v. *Santa Fe Elevator Co.*, 331 U.S. 218 (1947) 24
Rock Creek Ltd. Partnership, 41 F.E.R.C. ¶ 63,019 (1987) 4

Cases – Continued: Page

Rumford Falls Power Co.:
34 F.P.C. 27 (1965), rev'd, 355 F.2d 683 (1st Cir. 1966) 47
36 F.P.C. 605 (1966) 47
Seneca Nation of Indians, 6 F.P.C. 1025 (1947) ... 47
Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 43
Sperry v. *Florida*, 373 U.S. 379 (1963) 24, 46
Square D Co. v. *Niagara Frontier Tariff Bur.*, 476 U.S. 409 (1986) 22
Susquehanna Power Co., 19 F.E.R.C. ¶ 61,348 (1982) 19
Town of Springfield v. *McCarren*, 549 F. Supp. 1134 (D. Vt. 1982), aff'd, 722 F.2d 728 (2d Cir.), cert. denied, 464 U.S. 942 (1983) 24
Town of Springfield v. *Vermont Environmental Board*, 521 F. Supp. 243 (D. Vt. 1981) 24
Udall v. *FPC*, 387 U.S. 428 (1967) 10
Union Brokerage Co. v. *Jensen*, 322 U.S. 202 (1944) 46
United States v. *Appalachian Power Co.*, 311 U.S. 377 (1940) 31, 38
United States v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1913) 31
Washington Water Power Co., 10 F.P.C. 657 (1951) 19
Water of Hallett Creek Stream System, In re, 44 Cal. 3d 448, 749 P.2d 324, 243 Cal. Rptr. 887 (1988) 42

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 6, 31
Art. IV, § 3, Cl. 2 (Property Clause) 6, 31
Art. VI, Cl. 2 (Supremacy Clause) 43

Statutes and regulations—Continued: Page

Act of July 2, 1956, ch. 375, §4, 69 Stat. 368-369 .. 27

Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 ..... 5, 10, 25

§ 17(a)(1), 100 Stat. 1259 26

Federal Power Act of 1935, 16 U.S.C. 791a *et seq.* 1, 18

§§ 321, 1-29, 16 U.S.C. 791a-823 (Subch. I) .. 18

§ 4(a), 16 U.S.C. 797(a) 1a

§ 4(e), 16 U.S.C. 797(e) 6, 7, 10, 18, 20, 21, 22, 25, 28, 1a-3a

§ 4(f), 16 U.S.C. 797(f) 21, 3a

§ 6, 16 U.S.C. 799 ..... 20, 4a

§ 7(a), 16 U.S.C. 800(a) 18, 4a-5a

§ 7(b), 16 U.S.C. 800(b) 19, 5a

§ 7(c), 16 U.S.C. 800(c) 5a

§ 9(a)(2), 16 U.S.C. 802(a)(2) 5a-6a

§ 9(b), 16 U.S.C. 802(b) (1982) 11, 12, 13, 27, 28, 40, 41, 6a

§ 10(a), 16 U.S.C. 803(a) (1982) 9

§ 10(a), 16 U.S.C. 803(a) ..... *passim*, 6a-8a

§ 10(a)(2)(A)-(B), 16 U.S.C. 803(a)(2)(A)-(B) .. 25, 6a-7a

§ 10(a)(3), 16 U.S.C. 803(a)(3) 25

§ 10(g), 16 U.S.C. 803(g) 8a

§ 10(j), 16 U.S.C. 803(j) 8a-9a

§ 10(j)(1), 16 U.S.C. 803(j)(1) 25, 8a

§ 10(j)(2), 16 U.S.C. 803(j)(2) 25, 8a-9a

§ 13, 16 U.S.C. 806 20

§ 14(a), 16 U.S.C. 807(a) 19

Statutes and regulations—Continued: Page

§ 21, 16 U.S.C. 814 ..... 10, 28, 1a, 9a

§ 27, 16 U.S.C. 821 ..... *passim*, 9a

§ 30, 16 U.S.C. 823a 26

§ 30(c), 16 U.S.C. 823a(c) 26

§ 308(a), 16 U.S.C. 825g(a) 21

§ 310, 16 U.S.C. 825(*l*) 21

Federal Water Power Act, ch. 285, 41 Stat. 1063 .. 18

§ 27, 41 Stat. 1077 ..... 32, 33

Hetch Hetchy Act (Act of Dec. 19, 1913), ch. 4, 38 Stat. 242 32

§ 11, 38 Stat. 250-251 ..... 27, 32

Reclamation Act of 1902, ch. 1093, § 8, 32 Stat. 390 ..... 26-27, 28-29, 34

Cal. Water Code (West. 1971):

§ 1243 42

§ 1257 42

§ 1257.5 (Supp. 1989) 42

Miscellaneous:

50 Cong. Rec. (1913):

p. 4108 32

p. 4109 32

p. 4111 32

p. 4112 32

51 Cong. Rec. (1914):

pp. 11,414-11,415 38

p. 13,625 33

p. 13,630 34

p. 13,631 34

p. 13,815 ..... 34, 35

p. 13,816 35

p. 14,066 35

pp. 14,066 14,072 35

Miscellaneous – Continued: Page

p. 14,067 35
p. 14,070 34
p. 14,071 36
pp. 14,070-14,071 36
p. 14,139 37
pp. 14,139-14,140 35

53 Cong. Rec. (1916):
pp. 2968-2970 38
p. 4204 37-38

56 Cong. Rec. (1918):
pp. 9047-9048 40
p. 9110 40
p. 9115 40
p. 9810 40
pp. 9913-9115 40
pp. 9901-9903 40
pp. 10,493-10,494 40

H.R. 16,053, 63d Cong., 2d Sess. (1914) 38
H.R. 16,673, 63d Cong., 2d Sess. (1914) 33
H.R. 408, 64th Cong., 1st Sess. (1915) 37, 38
H.R. 8716, 65th Cong., 2d Sess. (1918) 39
H.R. 3184, 66th Cong., 1st Sess. (1919) 40
H.R. Doc. No. 1350, 60th Cong., 2d Sess. (1909) .. 31
H.R. Rep. No. 794, 57th Cong., 1st Sess. (1902) .. 28
H.R. Rep. No. 842, 63d Cong., 2d Sess. (1914) ... 33
H.R. Rep. No. 715, 65th Cong., 2d Sess. (1918) ... 39
H.R. Rep. No. 16, 64th Cong., 1st Sess. (1916) ... 37
H.R. Rep. No. 61, 66th Cong., 1st Sess. (1919) ... 39
H.R. Rep. No. 1318, 74th Cong., 1st Sess. (1935) .. 19
H.R. Rep. No. 934, 99th Cong., 2d Sess. (1986) ... 26

Miscellaneous – Continued: Page

Hearings on H.R. 14,893 Before the House Comm. on Public Lands, 63d Cong., 2d Sess. (1914) 32
Hearings Before the House Comm. on Water Power, 65th Cong., 2d Sess. (1918) 39
J. Kerwin, *Federal Water-Power Legislation* (1926) 30, 33, 39, 40
Pinchot, *The Long Struggle for Effective Water Power Legislation,* 14 Geo. Wash. L. Rev. 9 (1945) 30
S. 3331, 64th Cong., 1st Sess. (1915) 38
S. 1419, 65th Cong., 2d Sess. (1917) 40
S. Doc. No. 438, 60th Cong., 1st Sess. (1908) 31
S. Doc. No. 322, 64th Cong., 1st Sess. (1916) 38
S. Rep. No. 66, 64th Cong., 1st Sess. (1916) 37
S. Rep. No. 621, 74th Cong., 1st Sess. (1935) 19

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 877 F.2d 743. The pertinent orders of the Federal Energy Regulatory Commission (Pet. App. A14-A22, A23-A36) are reported at 38 F.E.R.C. ¶ 61,240 and 41 F.E.R.C. ¶ 61,198.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1989. The petition for a writ of certiorari was filed on August 26, 1989. The petition was granted on December 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Power Act, 16 U.S.C. 791a *et seq.*, are reproduced at App., *infra*, 1a-10a.

STATEMENT

Acting under authority conferred by the Federal Power Act, 16 U.S.C. 791a *et seq.*, the Federal Energy Regulatory Commis-

sion issued a license to the predecessor of respondent Rock Creek Limited Partnership for a hydroelectric project on federal public lands in California. One of the conditions of the license required the licensee to maintain specified minimum flows in the portion of the stream affected by the project. The licensee also applied for and received a water permit from the California State Water Resources Control Board. The Board, however, conditioned the permit on the maintenance of substantially higher in-stream water flows than those prescribed by the federal license. Petitioner seeks further review of a decision holding that the licensee may adhere to the in-stream flow requirements in the federal license, rather than the conflicting condition set forth in the state agency's water permit.

1. The Rock Creek project is a 3,000-kilowatt hydropower facility located on Rock Creek, a tributary of the South Fork American River in California. The project diverts water from Rock Creek, passes it through power turbines, and returns it to the American River approximately one mile from where it is diverted. The affected stretch of the stream lies entirely within federal public lands. See J.A. 14, 22-23, 52; Pet. App. A2.

On April 29, 1983, FERC entered an order granting a license for the project to Joseph M. Keating, the predecessor in interest of respondent Rock Creek Limited Partnership (the Partnership). J.A. 13-50; Pet. App. A14. The federal license included numerous conditions based on findings regarding the project's safety and economic feasibility, its effect on stream flows, its impact on environmental and cultural resoures, measures for protecting fish in the area, plans to create new recreational facilities, and the disposition of the power. J.A. 14-21.

One of the license's conditions, which was based on a study by the Partnership and a recommendation by the California Department of Fish and Game, required the Partnership to maintain minimum in-stream flows in the affected stretch at 11 cubic feet per second (cfs) from May through September and 15 cfs from October through April on an interim basis. "Based upon available information," the Commission concluded, these interim releases "would not adversely impact the fishery re-

sources of Rock Creek." J.A. 15-16.[1] The Commission also required the Partnership to conduct studies in conjunction with the California Department of Fish and Game to enable the Commission to set long-term minimum flow rates. J.A. 16.

The Commission concluded that "subject to the terms and conditions of the license, the Rock Creek Project is best adapted to a comprehensive plan for development of the South Fork American River Basin for beneficial public uses." J.A. 21.

2. The Partnership also applied to the California State Water Resources Control Board for a state water permit. On February 16, 1984, the Board granted a permit, finding that "sufficient water appears available to justify the requested diversion rates." J.A. 58. In considering whether the project would represent a beneficial use of water, the Board canvassed many of the same considerations that the Commission had addressed, including the need for the power from the project, the project's economic feasibility, and its environmental consequences. J.A. 54-58. The Board disputed the Commission's assessment of the project's effect on fish, stating that "no valid basis exists for the minimum flows proposed by • • • the Federal Energy Regulatory Commission." J.A. 59. Accordingly, while it granted a permit, the Board reserved jurisdiction to increase its in-stream flow requirements and directed the Partnership to undertake additional studies of the project's effect on fish. J.A. 60, 65-66.

In a subsequent order, the Board amended the permit to increase the required minimum flows to levels substantially higher than those established by the FERC license. J.A. 73-125. As

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[1] The Commission noted that its staff believed that the fish population in the affected stretch of the steam was constrained by factors other than "available adult habitat"—specifically, limited habitat for spawning and rearing fish and wide natural variations in stream flow caused by floods and periods of low water. J.A. 13. If that view was correct, the maintenance of higher in-stream flows would not result in greater numbers of adult fish. The State Water Board disagreed with this finding. See J.A. 115-119. The dispute in this case thus arises out of a difference over the interpretation of scientific data regarding the factors that determine the numbers of fish in the affected one-mile section of the stream.

amended, the state permit requires stream flows of 30 cfs for July through February and 60 cfs for the remainder of the year. J.A. 124. The Water Board has reserved jurisdiction to fix still higher flow requirements. J.A. 123-124.

3. a. In the meantime, the Partnership petitioned FERC for a declaratory order that the Commission had exclusive jurisdiction to establish long-term minimum flow rates. In March 1987, the Commission issued an order holding that the State "has no authority to set minimum flows for the project that conflict with those contained in the [FERC] license." Pet. App. A18. The Commission explained that "[t]he imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process" under the Federal Power Act and that, "[a]s such, the establishment of minimum flows is a matter beyond the reach of state regulation." *Id.* at A17. In the Commission's view, "[a]llowing states to prescribe minimum flows for licensed projects would interfere with the Commission's balancing of competing considerations in licensing," and "would essentially vest a veto authority over projects in the states." *Id.* at A17-A18.[2]

b. In a subsequent order, the Commission granted petitioner leave to intervene in the proceeding, but rejected its contention that the Federal Power Act's savings clause, Section 27, 16 U.S.C. 821, authorized the State Water Board to exercise concurrent jurisdiction over in-stream flows. Pet. App. A22, A23-A36. The Commission concluded that this Court's decision in *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152 (1946),

[2] In submissions to the Commission, the Partnership argued that compliance with the 30 cfs and 60 cfs requirements established by California authorities would render the project economically infeasible. Pet. App. A16-A17. Accordingly, the Commission convened a hearing before an administrative law judge to determine long-term flows for the project, taking into account both the impact of minimum in-stream flows on the fish population in the stream and on the financial feasibility of the project. *Id.* at A21-A22. The ALJ has issued an initial decision establishing long-term flow requirements at a higher level than the interim flows prescribed by the Commission but not as high as the State's Water Board had established. See *Rock Creek Ltd. Partnership*, 41 F.E.R.C. ¶ 63,019 (1987). Administrative appeals are pending before the Commission.

"clearly stands for the proposition that state laws that interfere with the Commission's comprehensive planning responsibilities under Section 10(a) of the FPA are preempted." Pet. App. A28. The Commission reiterated that "the imposition of mimimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process." *Id.* at A29. Although petitioner urged that the Federal Power Act's savings clause, Section 27, authorized States to prescribe minimum flow requirements, the Commission stated that this interpretation of the savings clause would render the Commision's comprehensive planning responsibility "meaningless." *Ibid.* The Commission rejected petitioner's argument that this Court's interpretation of Section 27 in *First Iowa*, which limited the savings clause to state laws recognizing proprietary rights in water, was dicta that had effectively been overruled in *California* v. *United States*, 438 U.S. 645 (1978). Pet. App. A30-A31, A34. The Commission also concluded that the enactment of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243, reinforced its interpretation of Section 27. Pet. App. A35.

4. California petitioned for review, and the court of appeals affirmed. Pet. App. A1-A13. The court examined the Federal Power Act "as a whole" to "determine how Congress intended to divide authority between the states and the federal government over hydropower projects." *Id.* at A7. "The weight of the [Commission's] comprehensive planning authority and the individual powers assigned to support that authority," the court declared, "fall[] quite heavily on the side of federal exclusivity." *Id.* at A8. The court stated that Section 27 was susceptible of "two conflicting readings"—one under which state authority was limited to "the area of property rights involving water for irrigation, municipal use, and related activities" and another under which the States would have "final authority over all issues connected to the control and use of water by a project licensed under the FPA." *Id.* at A8-A9. *First Iowa*, the court of appeals concluded, bound it to apply the first of these interpretations. *Id.* at A11.

The court rejected petitioner's contention that *First Iowa*'s discussion of Section 27 of the Act was dicta that had been

called into question by *California* v. *United States, supra*. Pet. App. A11-A12. And the court agreed with the Commission that petitioner's interpretation of Section 27 would effectively enable California to veto a project approved and licensed by the Commission, since changing minimum flow rates established in the federal license "would directly affect the project's ability to run its turbines and generate electricity at the level stated in the FERC license" and "would, in essence, create a different type of hydropower project from the one described in the license." Pet. App. A12.

SUMMARY OF ARGUMENT

Like *First Iowa Hydro-Elec. Coop.* v. *FPC, supra*, this case presents the question whether a hydropower project licensed under the Federal Power Act must comply with state regulatory requirements inconsistent with the terms of the federal license. As part of a process that provides for input from interested state and federal authorities, the Federal Energy Regulatory Commission has granted the Partnership a federal license, established minimum in-stream water flows on an interim basis, and reserved jurisdiction to establish long-term requirements. Its goal has been to protect fish in the affected reach of the stream, while also permitting effective development of its water power potential. Acting under authority of state water law, the California Water Resources Control Board has reviewed many of the same considerations that the Commission has addressed, but has disagreed with the Commission's judgment and has established substantially higher in-stream flow requirements than those in the federal license. In effect, the Board has found that a project the Commission has determined will advance the purposes of the Federal Power Act does not represent an appropriate use of water under state water law.

I. The question presented by these conflicting assertions of regulatory authority is one of statutory interpretation. There is no question that Congress has authority under the Commerce Clause and the Property Clause to regulate hydropower development upon the waterways subject to the Act. Under Sections 4(e) and 10(a) of the Act, 16 U.S.C. 797(e), 803(a), Con-

gress has exercised that constitutional authority by empowering FERC to issue licenses for hydropower projects that reflect the Commission's judgments regarding the projects' effects on a variety of interests—many of which are national or regional in scope. The question presented is whether the Act's savings clause, Section 27, reserves authority to the States to impose regulatory requirements on those projects that are inconsistent with license conditions that FERC has determined are appropriate to serve the public interest.

A. The Court's decision in *First Iowa* resolved that question in favor of the Commission. In that case, the Court reached and decided the question whether the Federal Power Act superseded a state statute regulating the construction of dams and the diversion of water. The Court concluded that the Federal Power Act left no room for conflicting state control over those aspects of hydropower development that the Act commits to the Commission's judgment, and construed Section 27 to preserve only those state water laws that establish proprietary rights in water. The Court's interpretation of Section 27 was necessary to the Court's decision, and it is controlling here.

B. The language of the savings clause and the remainder of the statutory scheme fully support *First Iowa's* interpretation. The category of laws that may potentially relate "to the control, appropriation, use, or distribution of water" is so broad that it could nullify the affirmative grant of authority to FERC; thus, it is appropriate to read the ensuing phrase "used in irrigation or for municipal or other uses" as a limitation on the category of laws saved. The references to water "used" and the particular uses enumerated in Section 27 are strongly suggestive of uses of water that give rise to proprietary rights under systems of water law based upon the principle of first appropriation. As *First Iowa* noted, the reference to "vested rights" reinforces the construction of Section 27 as limited to laws recognizing proprietary rights.

Since Section 27 is a savings clause, its interpretation must also reflect its role in the statute as a whole. Sections 4(e) and 10(a) of the Act vest the Commission with broad authority to direct the course of hydropower development by means of its licensing judgments. Congress clearly expected that those judg-

ments would be put into effect in the development of the Nation's hydropower resources. Thus, Section 27 should be construed in a manner that will not subordinate the Commission's determinations concerning the appropriateness of various projects to state law regulating the use of water.

C. The principle of *stare decisis* strongly supports this conclusion. This Court and other state and federal courts have faithfully applied *First Iowa* for almost 45 years. Congress has not seen fit to overrule that decision. Indeed, in 1986, Congress enacted the Electric Consumers Protection Act, a statute designed to channel state concerns regarding the environment and the comprehensive development of water basins through the Commission's licensing process. It is clear that Congress did not intend to allow States to veto the results of these procedures by imposing inconsistent regulatory requirements on the use of water. Finally, the Court's decision in *California* v. *United States, supra*, does not support the abandonment of *First Iowa*. By contrast to Section 27, the savings clause in the Reclamation Act at issue in *California* v. *United States* expressly requires the Secretary of the Interior to proceed "in conformity with [state] laws." The nature of the Federal Power Act's delegation of authority to the Commission also distinguishes this case from *California* v. *United States*.

D. The legislative history of the Federal Power Act does not justify revising *First Iowa*'s interpretation of the Federal Power Act and its savings clause. As this Court noted in *First Iowa*, that history is fully consistent with the Court's construction. Moreover, the doctrine of *stare decisis* weighs heavily against reconsideration of a settled interpretation of a statute based solely upon further review of its legislative history.

II. Applying the standards recognized by this Court in *First Iowa*, the Commission and the court of appeals correctly determined that the State Water Control Board lacked authority to impose in-stream flow requirements inconsistent with those prescribed in the federal license. Under California law, in-stream flows for the purpose of preserving fish cannot be the subject of a water right; thus, the in-stream flow condition in the State Water Board's order does not fall within *First Iowa*'s interpretation of Section 27. Further, the Board's imposition of

minimum flow requirements higher than those prescribed by the federal license conflicts directly with the Commission's exercise of its licensing authority. As the Commission explained, allowing the Water Board to impose its higher flow rates would interfere with the balance the Commission has struck under Section 10(a) between the economic and environmental consequences of the project. Both the Commission and the court of appeals were correct, therefore, in holding that the state in-stream flow requirements were unenforceable.

ARGUMENT

I. SECTION 27 DOES NOT RESERVE AUTHORITY TO THE STATES TO VETO THE EXERCISE OF THE COMMISSION'S AUTHORITY TO DETERMINE WHETHER AND ON WHAT TERMS A HYDROPOWER PROJECT WOULD REPRESENT AN APPROPRIATE USE OF WATER RESOURCES

This case calls upon the Court to determine the respective roles of two basic provisions of the Federal Power Act: (1) the affirmative grant of authority to the Federal Power Commission, now FERC, to determine – based upon its assessment of the economic, environmental, and other effects of a proposed water power project – whether and on what terms the public interest warrants issuance of a federal license for the project and (2) a savings clause, Section 27, that preserves from federal preemption certain state laws and vested rights.

The Federal Power Act delegates comprehensive authority to FERC to oversee the course of hydropower development. When the Commission issued its license in this case, Section 10(a) of the Act, 16 U.S.C. 803(a) (1982), provided that a license could be issued only when, "in the judgment of the Commission," the proposed project would be

> best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses * * *.

Under this Section, the Commission is responsible for exploring "all issues relevant to the 'public interest,' including future power demand and supply, alternate sources of power, the public

interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife." *Udall* v. *FPC*, 387 U.S. 428, 450 (1967). With the passage of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 [ECPA], Congress affirmed the Commission's responsibility for assessing the environmental consequences of hydropower projects and their effects on other "beneficial uses" of water, including "irrigation, flood control, water supply, and recreational and other [uses]." See 16 U.S.C. 797(e), 803(a).

In addition to this broad grant of authority to the Commission, the Federal Power Act also contains a savings clause, Section 27 (16 U.S.C. 821), which provides that nothing in the Act

> shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Petitioner maintains that Section 27 requires hydropower projects to comply with all state laws related to the "control, appropriation, use, or distribution of water," "irrespective of any rights and obligations under a FERC license." See Pet. Br. 10. Under this interpretation, every hydropower project on any navigable or non-navigable waterway within the Act's scope must comply with all state laws relating to the use of water, even if the effect is to foreclose development of the project on the terms that the Commission has determined would best serve the public interest.

This sweeping construction of Section 27 would, we submit, effectively nullify the authority that Congress delegated to the Commission. Section 27 preserves an important sphere of state authority and is unquestionably a significant element of the statutory scheme. But, as this Court held in *First Iowa*, it should be read to save only state laws recognizing proprietary rights in water—rights that entitle the owner to use (or to prevent others from using) water and that can be transferred or, if need be, condemned under Section 21 of the Act, 16 U.S.C. 814. In other words, Section 27 requires a federal licensee to acquire, either

by purchase or through the appropriate exercise of eminent domain, any property rights in water recognized under state law with which a proposed project would interfere. It does not, however, authorize state governments to exercise regulatory authority—either by statute or through the attachment of regulatory conditions to water rights—inconsistent with the Commission's exercise of its authority to determine what hydropower project will best serve the various interests committed to its judgment.

A. *First Iowa* Is Controlling With Respect To The Question Presented By This Case

In determining the scope of Section 27, the Court is not writing on a blank slate. Over forty years ago, in *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152 (1946), the Court examined the line that the Act draws between federal and state regulation and, in so doing, authoritatively construed Section 27. That decision—which limits Section 27 to state laws recognizing proprietary rights in the use of water—is controlling here.

1. In *First Iowa*, an applicant sought a license to build a power project on navigable waters in Iowa. The State argued that the Commission was obligated to deny the license because the applicant had not complied with Section 9(b) of the Act, 16 U.S.C. 802(b) (1982); that Section requires an applicant to provide the Commission with "[s]atisfactory evidence that the applicant has complied with the requirements" of certain state laws, including laws involving "the appropriation, diversion, and use of water for power purposes." In particular, the State contended that the applicant was ineligible for a license because it had not acquired a state permit for construction of a dam. To obtain such a permit, Iowa law required the applicant to show, among other things, that "any water taken from the stream in connection with the project [would be] returned thereto at the nearest practicable place." 328 U.S. at 164-166 (emphasis omitted).

This Court held that the applicant was not required either to obtain a state permit or to demonstrate compliance with state

law as a condition to the issuance of a federal license. 328 U.S. at 164, 170, 175, 177-178. Petitioner suggests that this decision can be read to hold only that Section 9(b) does not require an applicant to show compliance with state law *before* a federal license will issue – leaving open the question whether Section 27 would require compliance with state law *after* the federal license is granted. See Pet. Br. 42-43 & n.24. But that reading cannot be squared with the Court's reasoning. The Commission had dismissed the application on procedural grounds, without reaching the question whether Iowa had authority to demand compliance with its return flow requirement. 328 U.S. at 162. But as the Court observed, "[w]hile this avoid[ed] subjecting the petitioner to an arbitrary and capricious refusal of the permit it [did] not meet the substance of the objection to the order." *Id.* at 165. The Court further noted that the Commission subsequently took the position in its briefs and argument in this Court "that the requirements of Chapter 363 of the Code of Iowa as to this project have been superseded by those of the Federal Power Act." *Id.* at 161. The Court clearly chose to resolve the case on this broader ground. As the Court observed, "[i]f a state permit is not required, there is no justification for requiring the petitioner, as a condition of securing its federal permit, to present evidence of the petitioner's compliance with the requirements of the State Code for a state permit." *Id.* at 166-167.

The Court found that the question whether compliance with the state law could ever be required was presented because the Iowa statute made clear – as state officials asserted (328 U.S. at 171) – that the applicant could not possibly comply with the terms of the application and also obtain a state permit. The project would have diverted water from a 29-mile stretch of the Cedar River, and thus could not satisfy the state requirement that water taken from a river be "returned thereto at the nearest practicable place." *Id.* at 166. Accordingly, the Court "accept[ed]" that compliance with the Iowa statute would be impossible. *Id.* at 171.

On this assumption, the Court proceeded to examine the relevant provisions of the Federal Power Act – including Section 27 – and the Act's "long and colorful legislative history" (328

U.S. at 171), and concluded that "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." *Id.* at 181. The Court stated that requiring the applicant to secure a state permit would "vest in [state authorities] a veto power over the federal project" that could "destroy the effectiveness of the Federal Act" and "subordinate to the control of the State the 'comprehensive' planning" with which the Commission was charged. *Id.* at 164. To compel compliance with such a state law, the Court continued, would "subject to state control the very requirements of the project that Congress has placed in the discretion of the Federal Power Commission." *Id.* at 165. Thus, the Court held that the Iowa statute was preempted by the Federal Power Act. As the Court concluded (*id.* at 182): "It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others."

In reaching this conclusion, the Court gave extensive consideration to Section 27. 328 U.S. at 175-177 & n.20. Although the Court explained the purpose of its discussion of Section 27 partly in terms of confirming its understanding of the limited reach of Section 9(b) (328 U.S. at 175), there can be no doubt that its construction of Section 27 was essential to the conclusion that the Iowa statute was preempted by the Federal Power Act. If Section 27 preserved the Iowa statute requiring that any water taken from the stream be returned at "the nearest practicable place," then the Court could not have held that Iowa was without authority to insist on compliance with that provision. Indeed, the State of Iowa expressly advanced the argument, indistinguishable from petitioner's here, that its statute was saved by Section 27.[3] Thus, contrary to petitioner's contention, the

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[3] In its brief in this Court, Iowa argued (Brief for the State of Iowa at 19):

> An examination of Section 27 (821) indicates clearly that Congress did not intend "in any way to interfere with the laws of the respective states relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." This language is broad and general. It effectively saves all State

Court's determination in *First Iowa* that Section 27 is limited to state laws establishing proprietary rights in the use of water and vested rights therein was not "dicta." That discussion was necessary to the Court's holding, and should be controlling here.

B. *First Iowa* Is Fully Justified By The Language of Section 27 And Its Place In The Statutory Scheme

Petitioner takes issue with *First Iowa*'s analysis of both the text of Section 27 and the overall plan of the Act. It argues that limiting Section 27 to laws giving rise to proprietary water rights and vested rights therein would render the first clause of the section superfluous (Pet. Br. 10) and that the Court's decision in *First Iowa* reflects an unprincipled presumption against "dual systems" of state and federal regulation (*id.* at 40). These contentions are without foundation. The Court's analysis of Section 27 in *First Iowa* was well grounded in the language of the Section and the statute as a whole.

1. Section 27 does not save all state laws "relating to the control, appropriation, use, or distribution of water." Only laws involving "water used in irrigation or for municipal or other uses"—or "any vested right acquired therein"—are preserved.

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laws upon the subjects referred to. There can be no question but that the laws of the State of Iowa heretofore referred to relate to the control, appropriation, and use of waters for municipal as well as other uses. * * * The Executive Council has the duty in the first instance to determine whether or not petitioner's proposed project will interfere with the uses of the water by the public and by cities and towns located along Cedar River.

Throughout its brief, Iowa emphasized that the towns on the Cedar River that would be bypassed by the project used its flow to dispose of their sewage, and that this was a "municipal use." *Id.* at 7, 15, 19. This Court did not take issue with this characterization and thus necessarily rejected Iowa's interpretation of Section 27, which is indistinguishable from petitioner's here.

Petitioner argues that *First Iowa* can be distinguished on the ground that it was not "a water rights case" and that the applicant had acquired substantially all of the riparian rights involved. Pet. Br. 35 n.18. This attempted distinction contradicts petitioner's own interpretation of the statute; petitioner claims that Section 27 requires compliance with all state regulation relating to water, not just the acquisition of water rights.

As *First Iowa* recognized, this language must entail a limitation on the category of laws that are saved. If, as petitioner suggests, it had been Congress's intention to reserve to the States all of their authority to regulate the use of water, there would have been no need to refer to any of its specific uses or, for that matter, to "vested right[s]."

First Iowa's analysis of the nature of the limitation embodied in Section 27's language is thus entirely sound. The Court first noted that Section 27 "is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature." 328 U.S. at 175-176. The explicit reference to irrigation and municipal uses, the Court observed, indicates that the clause "has primary, if not exclusive, reference to such proprietary rights." *Id.* at 176. The Court found further support for this view in the phrase, "any vested right acquired therein." There is no reason to assume that the category of laws and the "vested rights" referred to in Section 27 are independent of one another. As *First Iowa* noted, it is appropriate to view the latter as intended to "emphasize[]" the Section's application to property rights. 328 U.S. at 176.[4]

The only language in Section 27 that might suggest a broader scope is the reference to "other uses." But *First Iowa* properly concluded that the interpretation of that phrase was governed by the "ejusdem generis" canon of construction (328 U.S. at 176):[5]

> Those words ["other uses"], however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a District Court, relating to

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[4] The legislative history indicates that, during debates of an antecedent of Section 27, the phrases "used in irrigation or for municipal or other uses" and "vested rights therein" were viewed as limitations on the savings clause. See pp. 35-37, 39-40 & n.33, *infra*.

[5] This canon provides that general words following specific words in a statutory enumeration are to be construed to embrace objects similar in nature to those covered by the specific words. See, *e.g.*, *Garcia* v. *United States*, 469 U.S. 70, 74 (1984).

> § 27 and upholding the constitutionality of the Act, where it was stated that "a proper construction of the act requires that the words 'other uses' shall be construed ejusdem generis with the words 'irrigation' and 'municipal.'" *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606, 619.[8]

This construction – limiting "other uses" to other proprietary uses – is eminently sensible. Irrigation and municipal uses are beneficial uses that can give rise to proprietary rights in water, and thus it is plausible to view the phrase "other uses" in a similar light. The phrase "used in" supports that interpretation; ordinarily, beneficial use is required to create – and continued use to preserve – an appropriative water right. Particularly in terms of the water systems prevailing when the Federal Power Act was enacted, it is unlikely that water laws regulating the natural flow of a stream would have been viewed as laws relating to "in-stream uses." See Pet. 10. For these reasons, as *First Iowa* found, it is most plausible to construe the laws saved by Section 27 as limited to those giving rise to proprietary rights.

In contrast, petitioner's construction would render the phrase "used in irrigation or for municipal or other uses" entirely superfluous. It would preserve any state law regulating any use of water that had any impact on a proposed hydropower project, including state statutes regulating hydropower projects identical to the one struck down in *First Iowa*. Under petitioner's view, all such statutes would be considered laws relating to the use of water "for power uses." See Pet. Br. 10. Although petitioner's argument is focused on California's water law and the order of the Water Control Board designed to provide additional protection for fish, its interpretation would not be limited to

[8] In *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 256 (1954), the Court noted that its interpretation of Section 27 "is applicable to proprietary water rights for power purposes as well as those for other proprietary uses," and it noted that any statements to the contrary in *Alabama Power Co.* were "not controlling." Contrary to petitioner's suggestion (Pet. Br. 10), *Niagara Mohawk* does not suggest that state regulation of the use of water for power purposes – beyond laws respecting proprietary interests – are preserved by Section 27. Indeed, by reaffirming the limitation to laws establishing "proprietary" rights, *Niagara Mohawk* suggests the exact opposite.

regulatory schemes of the type that California has adopted – or to orders purporting to advance environmental goals. Petitioner's interpretation would also extend to restrictions that States might seek to impose on interstate navigable waters, regardless of whether the statutes were based on considerations in conflict with those that Congress specified should govern hydropower development. The sweep of that interpretation and its failure to afford any significance to the qualifying language that this Court emphasized in *First Iowa* weigh heavily against petitioner's position.

2. In addition to its focus on the specific language of Section 27, *First Iowa* correctly concluded that its interpretation of Section 27 was "thoroughly consistent" with the basic statutory plan created by other provisions of the Act – *i.e.*, "with the integration rather than duplication of federal and state jurisdictions under the Federal Power Act." 328 U.S. at 176. Section 27 is a savings clause, and thus its interpretation should reflect its role in the Federal Power Act "as a whole," *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987). As in *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987), it would be incongruous to conclude that "Congress intended to undermine [a] carefully drawn statute through a general savings clause."[9] Accordingly, Section 27's interpretation should be "guided by the goals and policies of the Act," based upon a review of the statute "as a whole," as well as "its purposes and history." 479 U.S. at 493.

Under the Federal Power Act, the Commission has been given broad authority to oversee the development of the Nation's water power resources. *FPC* v. *Tuscarora Indian Nation*, 363 U.S. 99, 118 (1960). As this Court has observed, *FPC* v. *Union Electric Co.*, 381 U.S. 90, 98 (1965), the "central purpose" of the Act is "to provide for the comprehensive control over those uses of the Nation's water resources in which the

[9] See *Mansell* v. *Mansell*, 109 S. Ct. 2023, 2027-2031 (1989); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 220-221 (1986). See also *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986) ("In expounding a statute," the Court should "not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").

Federal government had a legitimate interest." Accord *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958).

The Commission's authority to issue and condition licenses is at the heart of this program. Under Section 4(e), 16 U.S.C. 797(e), FERC is authorized to issue licenses for hydropower projects within the scope of the Act.[8] When it acts upon an application for a license, the Commission is required by Section 10(a) to consider whether and to what extent a project will represent a prudent use of water power resources, taking account not only of the waterway's hydropower potential but also other "beneficial public uses." Under the present statute, the considerations that the Commission is expressly obligated to consider include "the use or benefit of interstate or foreign commerce," "the improvement or utilization of water-power development," "the adequate protection, mitigation, and enhancement of fish and wildlife," and other "beneficial uses, including irrigation, flood control, water supply, and recreational and other purposes." 16 U.S.C. 803(a).[9]

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[8] Congress enacted the Federal Water Power Act, ch. 285, 41 Stat. 1063, in 1920. That statute was reenacted with some modifications as Part I of the Federal Power Act of 1935, 16 U.S.C. 791a-823. See *FPC* v. *Union Electric Co.*, 381 U.S. 90, 91 n.2 (1965). One of the most important of these modifications was the extension of the Act to all waters subject to regulation under the Commerce Clause. See also *First Iowa*, 328 U.S. at 172 n.17. Although the 1935 amendments expanded the Commission's jurisdiction in some respects, they did not materially alter the relationship among the provisions at issue here. Accordingly, in general, our citations are to the 1935 Act.

[9] Closely related to Section 10(a) is Section 7(a), 16 U.S.C. 800(a). As amended in 1935, Section 7(a) requires the Commission to give preference to an application of a State or municipality if its plans "are deemed by the Commission equally well adapted * * * to conserve and utilize in the public interest the water resources *of the region*." 16 U.S.C. 800(a) (emphasis added). Likewise, as between other applicants, the Commission may give preference to the applicant whose plans the Commission "finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources *of the region*." *Ibid.* These provisions confirm that the interests that the Commission considers transcend those of any particular State.

The committee reports accompanying the 1935 amendment to Section 7(a), 16 U.S.C. 800(a), stated that its purpose was to "make clear the broad objective of the Act to secure Commission control over all subjects involving the

These are matters of national or regional significance which may not be fully reflected in the water law of a single State. For instance, the objective of improving waterways "for the use or benefit of interstate or foreign commerce" is a uniquely national concern. Indeed, given the scope of any particular project, the beneficial use issues that the Commission must also consider – water-power development, irrigation, flood control, water supply, recreation, and the environment – may affect one or more States.[10]

In the case of streams traversing federal public lands, the Commission must consider the effect of a project on property owned by the United States. Because the government has the option to recapture a private project at the expiration of the license term, the terms of the Commission's licenses shape projects that may eventually become property of the United States. 16 U.S.C. 807(a). In fact, the Federal Power Act confers on the Commission the task of assessing the nature of the projects that the federal government should itself undertake. 16 U.S.C. 800(b).

Also of national concern are the relative merits of using hydropower to satisfy demand for electricity, as opposed to

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development of the Nation's water resources." H.R. Rep. No. 1318, 74th Cong., 1st Sess. 24 (1935); S. Rep. No. 621, 74th Cong., 1st Sess. 44-45 (1935).

[10] On a number of occasions, the Commission has been called upon, with respect to projects affecting more than one State, to weigh interests in developing power resources and protecting the environment. *E.g.*, *New England Power Co.*, 5 F.E.R.C. ¶ 61,019 (1978); *Holyoke Water Power Co.*, 42 F.E.R.C. ¶ 62,166 (1988); *Holyoke Water Power Co.*, 42 F.E.R.C. ¶ 62,343 (1988) (orders requiring construction of fish passage facilities at existing projects on the Connecticut River in cooperation with the Fish and Wildlife Service and agencies of four affected States). See also *P.U.D. No. 1 of Chelan Co., Wash.*, 34 F.E.R.C. ¶ 63,044 (1986); *P.U.D. No. 1 of Chelan Co., Wash.*, 46 F.E.R.C. ¶ 61,033 (1989). In some instances, projects licensed by the Commission extend across state lines or lie on international borders. *Washington Water Power Co.*, 10 F.P.C. 657 (1951); *Susquehanna Power Co.*, 19 F.E.R.C. ¶ 61,348 (1982); *Power Authority of the State of New York*, 12 F.P.C. 172 (1953). The Commission has also exercised its authority to direct hydropower development by coordinating its consideration of licensing proposals in a river basin as a unit. *E.g.*, *Allegheny Electric Coop.*, 48 F.E.R.C. ¶ 61,363 (1989); *Noah Corp.*, 48 F.E.R.C. ¶ 61,354 (1989); *City of Jackson, Ohio*, 48 F.E.R.C. ¶ 61,355 (1989).

alternative sources of energy such as coal, domestic or imported oil, and nuclear energy—each of which presents important environmental and economic issues. When Congress empowered the Commission to issue licenses and charged it with responsibility to consider a wide range of water resource issues, it clearly intended that the Commission's judgments would be put into action in the development of the Nation's water power resources.[11]

The nature of the Commission's licensing authority supports an interpretation of Section 27 that, in the words of *First Iowa*, would avoid "futile duplication of two authorities over the same subject matter." 328 U.S. at 171. Sections 4(e) and 10(a) place "responsibility squarely upon" the Commission and vest the Commission with "final authority" to authorize hydropower projects. 328 U.S. at 168. Given the nature of the Commission's affirmative authority to determine when and under what conditions a hydropower project will serve the public interest, "[a] dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable." *Ibid.*; see *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20, 22-23 (1952). Cf. *Chicago & N.W. Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981).

Under the interpretation adopted in *First Iowa*, Section 27 assures "reasonable regulation of the use of" water power resources, and yet avoids the intrusion on state rights that would come about by "seiz[ing], abolish[ing], or eliminat[ing] water rights without compensation merely by force of the Act itself." *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 251, 252 (1954). See *Henry Ford & Son, Inc.* v. *Little Falls Fibre Co.*, 280 U.S. 369, 378-379 (1930). To construe the statute in the manner petitioner suggests, in contrast, would "imput[e] to Congress a

[11] The Act contemplates that when an applicant obtains a license, it will promptly build the project in accordance with the license terms. The grant of any license is "conditioned upon acceptance by the licensee of all of the terms and conditions of * * * [the Act] and such further conditions, if any, as the Commission shall prescribe." 16 U.S.C. 799. Once accepted, the terms of the license may not be altered except upon mutual agreement between the licensee and the Commission. *Ibid.* The licensee is required to commence and complete construction in a timely fashion. 16 U.S.C. 806.

purpose to paralyze with one hand what it sought to promote with the other." *American Paper Institute* v. *American Electric Power Service Corp.*, 461 U.S. 402, 421 (1983).

3. Provisions of the Act that enable States, in the course of the licensing process, to present their concerns to the Commission also weigh heavily against an interpretation of the statute that would allow States to impose regulatory requirements on hydropower projects incompatible with the Commission's licensing judgments. When it passed the Federal Water Power Act in 1920, Congress provided for notice to States and local governments whose interests would be affected by a proposed project. Under Section 4(f), 16 U.S.C. 797(f), the Commission must give prompt written notice of an application for a preliminary permit to "any State or municipality likely to be interested in or affected by such application." The same notice is required of any application for a license that has not been preceded by a preliminary permit. 16 U.S.C. 797(e).

In later amendments, Congress has elaborated on this aspect of the statutory scheme. Section 308(a) of the Act, 16 U.S.C. 825g(a), which was enacted in 1935, provides that "[i]n any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, [or] municipality." Agencies that take advantage of this opportunity enjoy the procedural rights prescribed by the Administrative Procedure Act and the opportunity for judicial review. See 16 U.S.C. 825*l*; *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. at 336-341. In addition, ECPA now requires the Commission to solicit and, if consistent with the purposes of the Act, to incorporate in its licenses the recommendations of state and local agencies. See pp. 24-26, *infra*. Although these statutory provisions postdate the enactment of Section 27, they are fairly viewed as elaborations on the basic statutory pattern enacted in 1920; they are, therefore, relevant to the determination of Section 27's role in the statute viewed as a whole.

The procedural provisions of the Act, in its initial form and as amended, thus channel the views of interested state agencies through the Commission's licensing process. The Act's procedural provisions buttress the conclusion that follows from the

nature of the Commission's substantive responsibilities: the Commission is ultimately to determine what hydropower projects will best serve the considerations committed to its judgment by the Federal Power Act—with the benefit of the view of agencies whose interests are affected by the project.[12]

C. No Intervening Event Would Justify Overruling *First Iowa*

The principle of *stare decisis* strongly supports adherence to the interpretation of Section 27 adopted in *First Iowa*. As this Court observed in *Square D Co.* v. *Niagara Frontier Tariff Bur.*, 476 U.S. 409, 424 (1986), there is a "strong presumption of continued validity that inheres in the judicial interpretation of a statute" and this Court is "especially reluctant to reject this presumption in an area that has seen careful, intense and sustained congressional attention." Thus, although "any departure from the doctrine of *stare decisis* demands special justification," "the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction." *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363, 2370 (1989).

This Court has affirmed the validity of *First Iowa* on a number of occasions, and it has been faithfully applied by state and lower federal courts. No decision of which we are aware has questioned *First Iowa*'s validity. With its passage of ECPA in 1986, Congress acted in reliance on the statutory plan that this Court outlined in *First Iowa*. Finally, this Court's decision in *California* v. *United States*, 438 U.S. 645 (1978), did not address or undercut the basis for *First Iowa*. Under these circumstances, petitioner's arguments against this long-settled understanding of the statutory scheme should be addressed to Congress.

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[12] Where the Commission is obligated to include conditions prescribed by another agency in a license, the Act so specifies. A license for a project within a federal reservation must "contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." 16 U.S.C. 797(e). Where a project will affect the navigable capacity of any navigable waters, no license may issue until the plans have been approved by the Chief of Engineers and the Secretary of the Army. *Ibid.*

1. The Court has specifically reaffirmed *First Iowa*'s construction of the Federal Power Act. In *Oregon* v. *FPC*, 211 F.2d 347 (9th Cir. 1954), the State of Oregon and other parties challenged the Commission's issuance of a license for a project on reserved lands; they argued that the project inadequately protected anadromous fish and that the licensee was required to comply with state law on that subject. The Ninth Circuit held that the Commission lacked authority to license a hydropower project to "use the waters of the Deschutes River either at the site of the power dam or elsewhere, contrary to Oregon state law." 211 F.2d at 354. The Commission was entitled, the court of appeals concluded, only to issue a "*permissive license*," not "a license purporting to grant the complete legal right to the construction and operation of the whole project." *Ibid.*

This Court reversed, noting that like *First Iowa*, the case "illustrate[d] the integration of the federal and state jurisdictions under the Federal Power Act." *FPC* v. *Oregon*, 349 U.S. 435, 437 (1955). After rejecting the State's objections based upon the Constitution and the Desert Land Act, the Court stated, with citations to *First Iowa* and Section 27 (349 U.S. at 444-445):

> There thus remains no question as to the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a power project on reserved lands of the United States, provided that, as required by the Act, the use of the water does not conflict with vested rights of others. [footnote quoting Section 27 omitted]. To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision.[13]

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[13] Justice Douglas's dissenting opinion agreed that although a State could demand compensation for the loss of any water power rights of which it was deprived by a federally licensed project, it "could not assert its regulatory powers to defeat the federal program, for the Supremacy Clause would prevent her." 349 U.S. at 453 n.1.

Since then, this Court has cited or referred with approval tc *First Iowa* on a number of occasions.[14] State and federal courts have also faithfully applied *First Iowa*'s reasoning, concluding that federal licensees are not obligated to comply with state laws imposing requirements inconsistent with the Federal Power Act.[15] To our knowledge, the validity of *First Iowa*'s explanation of the Federal Power Act's "integration of federal and state jurisdictions" and of Section 27's role in that scheme has not been questioned in any decision.

2. Nor has Congress seen fit, in the nearly 45 years since *First Iowa* was decided, to overturn that decision. To the con-

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[14] In *New England Power Co* v. *New Hampshire*, 455 U.S. 331, 338-339 n.6 (1982), the Court stated:

> Whatever the extent of the State's proprietary interest in the river, the pre-eminent authority to regulate the flow of navigable waters resides with the Federal Government, • • • which has licensed New England Power. • • • New Hampshire's purported 'ownership' of the Connecticut River therefore provides no justification for restricting or conditioning the use of these federally licensed units. See *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152 (1946).

See also *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. at 334; *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 223 n.34 (1983); *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 773 (1984); *Sperry* v. *Florida*, 373 U.S. 379, 385 & n.4 (1963); *City of Chicago* v. *Atchison T. & S.F.R.R.*, 357 U.S. 77, 90 (1958); *Rice* v. *Board of Trade*, 331 U.S. 247, 255 (1947); *Rice* v. *Santa Fe Elevator Co*, 331 U.S. 218, 234 (1947).

[15] *E.g.*, *Pennsylvania Dep't of Environmental Resources* v. *FERC*, 868 F.2d 592, 598 (3d Cir. 1989); *Mega Renewables* v. *County of Shasta*, 644 F. Supp. 491, 499 (E.D. Cal. 1986); *Town of Springfield* v. *McCarren*, 549 F. Supp. 1134, 1154-1157 (D. Vt. 1982), aff'd, 722 F.2d 728 (2d Cir.), cert. denied, 464 U.S. 942 (1983); *Town of Springfield* v. *Vermont Environmental Board*, 521 F.Supp. 243, 248-250 (D. Vt. 1981); *de Rham* v. *Diamond*, 32 N.Y.2d 34, 295 N.E. 2d 763, 767-768 (1973); *Oregon* v. *Idaho Power Co.*, 211 Ore. 284, 312 P.2d 583 (1957); *City of Tacoma* v. *Taxpayers of Tacoma*, 43 Wash. 2d 468, 262 P.2d 214 (1953). See also *California* v. *Oroville-Wyandotte Irrigation Dist.*, 411 F. Supp. 361 (E.D. Cal. 1975), aff'd, 536 F.2d 304 (9th Cir.), cert. denied, 429 U.S. 922 (1976). Cf. *National Fuel Gas Supply Corp* v. *Public Service Comm'n*, No. 89-7458 (2d Cir. Jan 24, 1990), slip op. 15-16 (noting, in case under the Natural Gas Act and Natural Gas Pipeline Safety Act, the burdensome procedural consequences of piecemeal state regulation duplicating federal regulation).

trary, in 1986, Congress passed legislation elaborating on the statutory scheme outlined in *First Iowa*. Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243.

Three provisions of ECPA are directly relevant to the question at hand. First, as amended by ECPA, the Federal Power Act now requires the Commission to give "equal consideration" to the environmental consequences of a project, including "the protection, mitigation, of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)," 16 U.S.C. 797(e), and to include conditions in each license "for such protection, mitigation, and enhancement," 16 U.S.C. 803(j)(1). Second, those conditions must be based on recommendations received from federal authorities and "State fish and wildlife agencies." 16 U.S.C. 803(j)(1). If the Commission believes that a recommendation is inconsistent with the purposes of the Act, it must attempt to resolve the inconsistency and, failing that, publish findings explaining why the state or federal agency's recommendation is inconsistent with the Act and why the conditions selected by the Commission comply with the goal of protecting and enhancing fish and wildlife. 16 U.S.C. 803(j)(2). Third, in discharging its responsibility to ensure that a hydropower project is best adapted to a comprehensive plan for improvement of a waterway, the Commission is now specifically directed to "consider" (i) the extent to which the project would be consistent with any comprehensive plan for the waterway prepared by a state or federal agency and (ii) the "recommendations" of federal and state agencies exercising administration over flood control, navigation, irrigation, recreation, and cultural and other relevant resources of the State in which the project is located. 16 U.S.C. 803(a)(2)(A)-(B). The Act also requires the Commission to solicit recommendations from those agencies "for proposed terms and conditions for the Commission's consideration for inclusion in the license." 16 U.S.C. 803(a)(3).

These amendments build upon the basic plan that this Court discerned in the Federal Power Act—"a dual system involving the close integration of [state and federal powers] rather than a futile duplication of two authorities over the same subject mat-

ter." *First Iowa,* 328 U.S. at 171.[16] State, federal, and regional concerns are channeled, in the form of recommendations, through the Commission's licensing process. The Commission is obligated to consider those recommendations and give them due weight, but it is the Commission that enjoys the final authority, subject to judicial review, to determine whether and on what terms a license should be granted.[17] It is very unlikely that Congress would have directed the Commission, numerous state and federal agencies, and courts called upon to provide judicial review to adhere to these detailed procedures if it had believed that a state agency could effectively annul the result.[18]

3. This Court's decision in *California* v. *United States, supra,* does not justify abandonment of *First Iowa.* See Pet. Br. 12-17, 37-38. In *California* v. *United States,* this Court held that Section 8 of the Reclamation Act of 1902, ch. 1093, 32 Stat.

[16] Echoing *First Iowa,* the conference report accompanying ECPA made clear that state agencies were not to have a "veto" over a Commission licensing determination (H.R. Rep. No. 934, 99th Cong., 2d Sess. 23 (1986)):

> Section 10(j) does not give such agencies a veto, nor does it give them mandatory authority, * * *
>
> Under new section 10(j), FERC is empowered to decide license terms and conditions, but there is a guarantee that the recommendations of the agencies cannot be lightly dismissed. FERC is not required to adopt recommendations that are inconsistent with any other purpose of the Federal Power Act as expressed in section 4(e).

See *id.* at 22, 30.

[17] By contrast, Section 30 of the Federal Power Act, 16 U.S.C. 823a—a provision enacted in 1978 that authorizes the Commission to grant exemptions from its licensing requirements for certain small power projects of 15 megawatts or less—requires the Commission to consult with federal and state fish and wildlife agencies and to include in an exemption such terms and conditions as those agencies determine are "appropriate to prevent loss of, or damage to" fish and wildlife resources of the State in which the project is to be located. 16 U.S.C. 823a(c)

[18] Section 17(a)(1) of ECPA, 100 Stat. 1259, provides that the Act shall not "affect the rights or jurisdiction of the United States, the States, Indian tribes, or other entities over waters of any river or stream or over any ground water resource." This section in consistent with the understanding implicit in the remainder of the Act—*i.e.*, that the division of state and federal authority under the Federal Power Act as amended would remain as this Court had described it in *First Iowa.*

390, requires the Secretary of the Interior to comply with state law when appropriating and distributing water in connection with a federal reclamation project unless compliance with such laws would be "inconsistent with clear congressional directives regarding the project." 438 U.S. at 672. Petitioner argues that "[s]ince *California* holds that section 8 [of the Reclamation Act] requires federal reclamation projects to comply with state regulatory water laws, and since section 27 [of the Federal Power Act] was modeled after section 8, section 27 similarly requires hydropower projects to comply with such state laws." Pet. Br. 14.

There are several flaws in this syllogism. At the outset, although Section 8 and Section 27 employ similar language, there are material differences between them. Section 8 provides that "the Secretary of the Interior, in carrying out the provisions of [the Reclamation Act], *shall proceed in conformity with [state] laws* * * *." 32 Stat. 390 (emphasis added). In *California* v. *United States,* 438 U.S. at 674-675, this Court placed substantial emphasis on that language. There is no comparable directive, either to the Commission or an applicant for a federal license, in the Federal Power Act. Indeed, this Court made clear in *First Iowa* that Section 9(b) of that Act, the only potential counterpart to the "in conformity" language of the Reclamation Act, "does not itself require compliance with any state laws." 328 U.S. at 177.[19]

In addition, the Court in *California* v. *United States* attributed "controlling significance" to the fact that, under the Reclamation Act, the Secretary of the Interior was required "to appropriate, purchase, or condemn necessary water rights in strict conformity with state law." 438 U.S. at 665. As the House Report had stated, the Secretary of the Interior could not take any action in appropriating state waters of the state streams

[19] Petitioner refers (Pet. Br. 12 n.11) to a 1964 Senate report collecting 37 statutes reflecting deference to state water law. The three statutes that contain language most similar to that of Section 27 are: Section 8 of the Reclamation Act of 1902, ch. 1093, 32 Stat. 390; Section 11 of the Hetch Hetchy Act (Act of Dec. 19, 1913), ch. 4, 38 Stat. 250-251; and Section 4 of the Act of July 2, 1956, ch. 375, 69 Stat. 368-369, which relates to reclamation. Unlike the Federal Power Act, however, all three include the "in conformity" language.

"which could not be undertaken by an individual or corporation if it were in the position of the Government as regards the ownership of its lands." *Id.* at 665 (quoting H.R. Rep. No. 794, 57th Cong., 1st Sess. 7-8 (1902)). In contrast, Section 21 of the Federal Power Act specificially confers a federal right of eminent domain upon any licensee of a water power project deemed by the Commission to be "desirable and justified in the public interest." 16 U.S.C. 814. In this critical respect, then, the relative balance that Congress struck between state property rights and federal powers is significantly different under the two Acts.

More broadly, *California* v. *United States* expressly holds that state law need not be followed when there is a "clear congressional directive" to the contrary. 438 U.S. at 672. The Federal Power Act, as amended by ECPA, contains just such a directive: the provisions of Section 4(e) and Section 10(a) requiring FERC to determine, after receiving appropriate recommendations from affected state agencies, whether a proposed federal water power project is in the public interest. *California* does not suggest that a clear delegation of authority to a federal agency is any less deserving of protection from an inconsistent state law than any other type of "clear congressional directive." Just as Section 8 cannot be construed to contradict a substantive provision in the Reclamation Act (see 438 U.S. at 668-669 n.21, 672 n.25), Section 27 should not be held to undercut the effectiveness of the Federal Power Act's delegation of authority to the Commission to direct the course of hydropower development.

In short, there are significant distinctions between Section 8 of the Reclamation Act and Section 27 of the Federal Power Act, and, even if these distinctions were not alone sufficient to distinguish *California,* the Commission's licensing authority could properly be preserved within the qualification to the holding in that case for express congressional directives. In this regard, we note that the Court's opinion in *California* did not refer to *First Iowa,* leaving open the question of how the Court's reasoning would bear on the Federal Power Act.[20] Thus, neither

[20] In its Reply Brief in *California* v. *United States*, petitioner noted that Sections 9(b) and 27 of the Federal Power Act, unlike Section 8 of the Reclamation Act, "do not require the [Commission] to 'proceed in conformity with state laws.'" Petitioner also suggested that *First Iowa* had "properly rejected" the argument that a State could exercise a veto power over a hydropower project, "ruling that the federal government has exclusive authority to license the construction and operation of such projects." Reply Brief for the Petitioners at 16-17 & n.3, *California* v. *United States, supra.* Our brief in that case argued that the government's interpretation of the Reclamation Act was consistent with cases interpreting "similar provisions in other statutes," that the "closest analogous case" was *First Iowa*, and that Section 27 was "similar to Section 8 of the Reclamation Act, but broader." Brief for the United States at 51-54 & nn. 30-31, *California* v. *United States, supra*; see *id.* at 128-129.

the holding nor the reasoning of *California* v. *United States* requires abandonment of *First Iowa*'s authoritative interpretation of the Federal Power Act.

Petitioner also argues that its construction of the Federal Power Act is necessary to avoid anomalies in this area. See Pet. Br. 15-17. In its view, hydropower projects are private, profit-oriented ventures serving "more local goals" than federally funded reclamation projects and thus Congress must have intended to subject the former to all state water laws. *Id.* at 16. We disagree. It is untenable to suggest that Congress, which struggled with hydropower legislation for almost a decade before enacting the Federal Power Act, viewed the matter as one of primarily private or local concern. See *First Iowa,* 328 U.S. at 180 & n.23. Deficiencies in the Nation's efforts to develop its hydropower resources were viewed as an issue of pressing national importance; the fact that Congress chose, understandably, to rely primarily on the private sector to develop the country's numerous hydropower sites, under the Commission's oversight, does not suggest any lack of interest in the course of development.

Hydropower remains an issue of national importance today, particularly in view of concern for renewable sources of energy and the environment. The Commission has issued 1077 licenses for terms up to 50 years for hydropower projects representing about 52 million kw of capacity. These projects produce about five percent of the Nation's electrical energy needs—the equivalent of approximately 340 million barrels of oil per year. Indeed, in recent years, Congress has sought to reduce the demand for

fossil fuels by encouraging small power production facilities. See *FERC* v. *Mississippi*, 456 U.S. 742, 750, 756-757 (1982). Very recently, as a result of the President's directive to the Secretary of Energy to develop a comprehensive strategy, the Department of Energy has announced a new conservation policy designed to reduce oil consumption and the threat of global climate change. This policy includes an initiative under which DOE will work with FERC, other federal agencies, and the States to streamline the regulatory process, including licensing procedures. These efforts demonstrate the continuing importance of ensuring a vigorous federal presence in directing the development of the nation's hydropower resources.

D. The Background and Legislative History Of The Federal Power Act Do Not Provide Any Basis For Overruling *First Iowa*

In *First Iowa*, this Court specifically referred to the legislative history of Section 27 in concluding that that provision applies only to state laws recognizing proprietary rights. 328 U.S. at 176 & n.20. The doctrine of *stare decisis* weighs heavily against upsetting this settled interpretation based only upon a further review of legislative history. See *Patterson* v. *McLean Credit Union*, 109 S. Ct. at 2370 ("In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either judicial doctrine or further action taken by Congress."). But in any event, the legislative history of the Federal Power Act does not support petitioner's interpretation of the statute.[21]

Petitioner's account of the lengthy process leading to enactment of the Federal Water Power Act of 1920 omits or distorts significant elements of the Act's history. While petitioner recounts the history of statutes in which Congress deferred to state water law (Pet. Br. 18-22), it ignores the emerging awareness, in the period immediately preceding the enactment of the Federal Water Power Act, of federal authority over the Nation's

[21] The history of the Federal Water Power Act is recounted in Pinchot, *The Long Struggle for Effective Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945), and J. Kerwin, *Federal Water-Power Legislation* 171-263 (1926).

water power resources and the need for a national solution to problems posed by hydropower development. Moreover, petitioner indiscriminately marshals statements favorable to its position from legislative materials, but makes no effort to relate those statements to the particular bills or amendments that were being debated or to identify the speaker's interest in the matter being considered. Viewed in proper context, those statements do not have the significance petitioner suggests.

1. Congress enjoys broad authority under the Commerce Clause and the Property Clause to regulate the use of water resources. See *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426 (1940); *FPC* v. *Oregon*, 349 U.S. at 442-443. Recognition of this authority, coupled with a growing awareness of the need for federal regulation, were important elements in the history of federal water power legislation. A milestone in that history was President Theodore Roosevelt's vetoes of two bills that would have authorized construction of hydropower dams across the Rainey and James Rivers. *FPC* v. *Union Electric Co.*, 381 U.S. at 98-99 n.11. Both veto messages insisted on the enactment of legislation establishing a federal policy for comprehensive hydropower development. S. Doc. No. 438, 60th Cong., 1st Sess. (1908); H.R. Doc. No. 1350, 60th Cong., 2d Sess. (1909). With the second of these messages, President Roosevelt provided Congress with a lengthy memorandum from the Solicitor General expressing the opinion that such a policy could constitutionally be implemented by means of conditions on grants of permission to build projects on navigable waterways. H.R. Doc. No. 1350, *supra*, at 16-25.

Thereafter, in *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 62 (1913), the Court confirmed the breadth of Congress's authority over navigable waterways. The Court stated that Congress's power to regulate commerce (*id.* at 63)

> comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public prop-

erty of the nation, and subject to all the requisite legislation by Congress.[22]

In 1913, when it enacted the Hetch Hetchy Act, Congress employed the conditional grant technique in order to impose restrictions on a water project in a national park. Act of Dec. 19, 1913, ch. 4, 38 Stat. 242. The Hetch Hetchy Act granted the City of San Francisco permission to build a dam in Yosemite National Park to provide the City with water for municipal uses. The grant was subject to various conditions, one of which required the City to maintain prescribed minimum flows to the Modesto and Turlock Irrigation Districts in accordance with their vested water rights. The Act also contained a savings clause similar to Section 27 of the Federal Water Power Act. § 11, 38 Stat. 250-251.[23] Notwithstanding claims that the legislation overstepped constitutional limitations on Congress's power and infringed upon state sovereignty over water resources, see 50 Cong. Rec. 4108, 4109, 4111 (1913) (remarks of Rep. Mondell), the legislation was enacted.

The Hetch Hetchy Act represented an important step toward recognizing a federal regulatory role in the development of water power resources.[24] There would continue to be disagreement—not, as petitioner suggests, unanimity—regarding the appropriate roles of the federal government and the States in this area. However, with the passage of the Hetch Hetchy Act, ma-

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[22] In *Chandler-Dunbar*, the issue was whether the government could be required to compensate a power company for the value of water power rights in a navigable stream. The Court held that no compensation was due. The Federal Power Act does not, however, purport to extinguish property rights without compensation. See *FPC* v. *Niagara Mohawk Power Corp.*, *supra*.

[23] On the floor of the House, Representative Ferris of Oklahoma stated that the purpose of the savings clause was to make clear (50 Cong. Rec. 4112 (1913)):

> that the Federal Government does not intend to interfere with the prescribed and vested rights of these irrigation people.

[24] See *Hearings on H.R. 14,893 Before the House Comm. on Public Lands*, 63d Cong., 2d Sess. 152-153 (1914) (testimony of Gifford Pinchot) (referring to the implications of the *Chandler-Dunbar* case and the Hetch Hetchy Act for federal water-power legislation).

jorities of both Houses recognized the authority on which federal water power legislation would ultimately be based.

2. Between 1914 and 1920, a series of water power bills were introduced in both Houses of Congress. Until 1918, navigable waters and public-land waterways were addressed in separate bills.[25] Petitioner relies principally on the public-land bills, none of which contained a grant of broad authority, comparable to Section 10(a) of the present Act, empowering a federal commission to oversee the comprehensive development of water resources. The speakers on those bills thus had no occasion to address the critical point at issue here—the relation between the Federal Power Act's delegation of authority to the Commission to oversee water power development and Section 27's reservation of authority to the States. The most significant element of these debates, for present purposes, was the emergence of two alternative versions of the savings clause—a broad version that was to be abandoned and the narrower version ultimately enacted.

a. The *Ferris Bill*. Petitioner relies heavily on debate over the Ferris bill of 1914, H.R. 16,673, 63d Cong., 3d Sess. (1914). Pet. Br. 23-27. As petitioner notes, when it was reported to the floor of the House, this bill contained a savings clause (Section 14) identical to what would become Section 27 of the Federal Water Power Act. H.R. Rep. No. 842, 63d Cong., 2d Sess. 4 (1914). In his section-by-section analysis of the bill, not cited in petitioner's brief, Representative Ferris of Oklahoma explained that the purpose of that provision was as we suggest—*i.e.*, to "disclaim[ ] any intention on the part of the Federal Government to interfere with vested rights or the State laws with reference to water rights or the appropriate distribution of water used for irrigation or municipal purposes." 51 Cong. Rec. 13,625 (1914). Thereafter, he expressed the view that any adequate water power bill should provide that the "Federal Government should at all times maintain its paramountcy and full control." *Ibid.*

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[25] See *Chemehuevi Tribe of Indians* v. *FPC*, 489 F.2d 1207, 1220 n. 61 (D.C. Cir. 1973), rev'd, 420 U.S. 395 (1975); J. Kerwin, *supra*, at 171-216.

Representative Mondell of Wyoming rose to *oppose* the bill, on the ground, among others, that Section 14 inadequately protected state prerogatives. 51 Cong. Rec. 13,630 (1914). His remarks were emphatically not—as petitioner's extensive quotations suggest (Pet. Br. 23-24)—an explanation of Section 14's meaning. Indeed, he expressed the position that the savings clause was not broad enough to protect the conception of state water law for which he argued in the passages quoted in petitioner's brief. In that connection, he contended that although there were similarities between the savings clauses in the Reclamation Act and the Ferris bill, the federal authority contemplated by the Ferris bill made its savings clause inadequate. Accordingly, he maintained that the Ferris bill should be amended to delete provisions that he believed would infringe upon exclusive state control over water and to broaden the savings clause.[26]

In keeping with his view that Section 14 inadequately protected state interests, Representative Mondell later offered an amendment that would have expressly conditioned a lease of federal public lands for a hydropower project on the acquisition of state water rights. 51 Cong. Rec. 13,815 (1914). Though he was careful to suggest that the Ferris bill might effectively require the same result, he contended that the amendment was

[26] Representative Mondell noted that Section 14 was "somewhat similar" to Section 8 of the Reclamation Act, but he argued that it was inadequate in the context of the power bill. 51 Cong. Rec. 13,631 (1914). While, in Representative Mondell's view, there was nothing in the Reclamation Act that "need raise the question of the right of a State to control the use of water," he apparently understood the power bill to be different in this respect. Thus, he argued that some provisions of the Ferris bill "should go out" and also advocated broadening the savings clause (*ibid.*):

> It would also be well if this provision of the bill could be broadened as to clearly express the fact that nothing contained in this legislation should, and nothing in it can, in fact, interfere with the right of a State to regulate the use of nonnavigable water for all purposes within its boundaries.

See *id.* at 13,631, 14,070 (also arguing for broader savings clause). Representative Mondell had been the principal sponsor of the Reclamation Act, *California* v. *United States*, 438 U.S. at 665, and was thus well qualified to speak to the differences between that Act and the Ferris bill.

necessary to avoid disturbing "the relative jurisdiction of the States and of the National Government." *Ibid.* The amendment provoked a pointed question from Representative Raker of California as to whether it "will practically defeat any leasing of the land for the purposes of the bill." *Ibid.* Representative Ferris stated that if the amendment passed it would be "doubtful if anyone would try to acquire rights in a State to develop water power," *id.* at 13,816, and the amendment was defeated.

Later, the House considered an amendment offered by Representative Mann of Illinois that would have deleted the savings clause altogether. 51 Cong. Rec. 14,066-14,072, 14,139-14,140 (1914). Representative Mann expressed concern that Section 14 could allow States to block hydropower development, suggesting that "the Government may give the right to a company for a lease on a dam site to erect a power plant, and the next year the State may take all the water rights away from the company." *Id.* at 14,066. Representative Taylor of Colorado, identifying himself as the author of Section 14, objected strenuously to the proposed amendment, but stressed Section 14's limits. He maintained that the savings provision was necessary to prevent power companies from diverting water for purposes other than power and emphasized that the savings clause "was put in there because it was necessary to protect the vested water rights of the West and nothing else." *Id.* at 14,067.[27] To

[27] Representative Taylor stated (51 Cong. Rec. 14,067 (1914)) (emphasis added):

> [I]f the gentleman from Illinois does not want to deliberately take away the vested rights of the Western States to the waters which our people can and are now using for irrigation of their growing crops, he would not offer this kind of an amendment. We know full well, and much better than he does, what it would mean to pass this bill without this section 14 in it. Practically every drop of the natural flow of the waters of every stream in every Western State today is appropriated and being beneficially used. It is appropriated by our citizens and under our State laws. It is appropriated under the Constitution of the United States and the constitution of our own States, and under the acts of Congress of 1866 and 1872. That water now is going to be hereafter allowed to be used by big and little power companies for power purposes.
>
> *We are not objecting to its being used for power purposes.* It does not diminish the water as it falls down the mountain side and turns a wheel.

be sure, the Mann amendment also provoked statements construing Section 14 more broadly, but these cannot fairly be taken as authoritative expressions of the intent of the bill.[28]

The House returned to the Mann amendment several days later and disposed of it by adopting a *broader* version of the savings clause. Representative Taylor, who had earlier assured Representative Mann that Section 14 was designed only to protect vested rights, offered an amendment to Section 14 striking all of its language after the word "water," saying that this change would make the section "much broader than it is now."

> *But if you permit these power companies to take the water out of that stream and divert it from its use for irrigation and disregard the irrigator's rights,* you simply destroy the vested rights of 40 years in the West. It would be a high-handed confiscation of our property rights. That is what it amounts to.
>
> * * * I took this language of section 14 from section 8 of the reclamation law and inserted it in this bill. That was put in there because it was *necessary to protect the vested water rights of the West and nothing else*, and nobody who respects the law or the vested rights of the settlers has ever from that day to this found any complaint with it, nobody has ever said the Government could not construct 32 reclamation projects in the West and operate them by virtue of that section being in there. It simply respects and protects the lawful rights of the farmers and miners and the inhabitants generally of the West.

See also *id.* at 14,071. Petitioner quotes brief excerpts from the same speech (Pet. Br. 24-25), but omits all mention of these passages.

[28] In response to a question from Representative Stevens, Representative Raker stated that "State law would control" in the event that a State had laws "governing the use of water for the development of power, which laws vary materially from the rules and regulations set out in this act." 51 Cong. Rec. 14,070-14,071 (1914). Representative Seldomridge also stated that the bill should provide that "[t]he power company will have to come in and conform to the laws of the State." *Id.* at 14,071. In his view, however, the best way to resolve the "many points of conflict between Federal and State authority" in the bill was to give "to the States the power to regulate and control the development of power companies within their borders, thereby preventing any conflict whatever between the State and the Federal Government." *Ibid.* Especially in view of the more narrow explanations of Section 14's purpose by Representatives Ferris and Taylor, these statements cannot fairly be taken to express the intention of the Congress that enacted the Federal Water Power Act six years later. Compare Pet. Br. 25-27.

51 Cong. Rec. 14,139 (1914).[29] Representative Mann, who had offered the amendment to strike the narrower version of Section 14, agreed to the modification, acquiescing in Representative Taylor's suggestion that it would prevent private interests from monopolizing water in the West. *Ibid.* Representative Mondell, who had earlier objected to Section 14 as too narrow, now argued that the Section's reference to "any vested right acquired therein" should not be deleted. *Ibid.* However, Representative Taylor responded that this could narrow the effect of the amendment. The amendment carried, and the Ferris bill passed the House with Section 14 in that form. However, the bill failed to pass in the Senate.

b. *Later Public Lands Bills.* Both Houses of the next Congress resumed consideration of water power legislation covering projects on public lands, each taking up a version of H.R. 408, 64th Cong., 1st Sess. (1915). Petitioner quotes at length from the committee reports and debates on these bills (Pet. Br. 27-30) without noting a critical fact. As reported, both bills contained the broader version of Section 14 of the Ferris bill that Representative Taylor had described the previous year as "much broader" than the provision which was ultimately to be enacted. See H.R. Rep. No. 16, 64th Cong., 1st Sess. 4 (1916); S. Rep. No. 66, 64th Cong., 1st Sess. 3 (1916). In fact, the very first section of the Senate version of H.R. 408 provided that "no lease [for a hydropower project] shall be granted until the applicant has complied with the laws of the State, States, or Territory wherein such project is to be located, providing for the appropriation of water" needed for the project. S. Rep. No. 66, *supra*, at 1.[30]

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[29] Under Representative Taylor's amendment, Section 14 read:

> Sec. 14. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water.

[30] It is not clear whether, in the colloquy quoted by petitioner (Pet. Br. 29-30), Senators Borah and Myers were referring to this provision or to the savings clause. In the fashion of other dialogues whose purpose may have been to impress a very limited view of Congress's power on the legislative history, these Senators also agreed, in their very next exchange, that the federal government had no constitutional authority to "acquire any interest to the use of the water other than for the purpose of navigation." 53 Cong. Rec. 4204

Moreover, neither of these bills included any provision similar to Section 10(a) of the present Act. Therefore, statements regarding the House and Senate versions of H.R. 408 shed no light on the relationship between Sections 10(a) and 27 of the present law or on the meaning of the critical qualifying phrase that appears in the narrower version of the savings clause, "of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

c. *The Administration Bill and the Passage of the Act.* In the meantime, Congress had also considered separate bills relating to dams on navigable rivers—including the Adamson bill, H.R. 16,053, 63d Cong., 2d Sess. (1914), see 51 Cong. Rec. 11,414-11,415 (1914), and the Shields bill, S. 3331, 64th Cong., 1st Sess. (1915), see S. Doc. No. 322, 64th Cong., 1st Sess. (1916). Each of these bills contained a provision that would have conditioned approval of a dam across a navigable river on a finding, similar to that ultimately contained in Section 10(a), that the project was "best adapted to a comprehensive plan for the improvement of the waterway in question." [31] The Adamson bill passed the House, the Shields bill passed the Senate, but neither achieved passage by both chambers.

In 1918, to break the impasse over water power legislation, President Wilson directed the Secretaries of War, Interior, and Agriculture to draft a single bill covering both navigable waters and waterways on public lands. At the President's request, the

(1916) (remarks of Sen. Borah). This narrow view was not, however, the constitutional understanding that informed the Act. See *United States* v. *Appalachian Power Co.*, 311 U.S. at 426-427.

[31] For example, as it was reported to the floor of the Senate, S. 3331, *supra*, provided in Section 2 that a license for a water power project on a navigable waterway could be issued only upon a finding that the project was "such as in the judgment of the Secretary of War shall be best adapted to a comprehensive plan for the improvement of the waterway in question for the uses of navigation and for the full development of its water power and for other beneficial public purposes, and best adapted to conserve and utilize the water resources of the region in the interests of navigation, the needs of the Government, and the public welfare." See also H.R. 16,053, *supra*, § 3.

In the Senate, this grant of federal authority provoked opposition on the ground that the federal government's role was limited to protecting navigation. 53 Cong. Rec. 2968-2970 (1916) (remarks of Sen. Works).

House created the Joint Water Power Committee, consisting of members of the Committees on Interstate and Foreign Commerce, Public Lands, and Agriculture, which conducted hearings on the bill. *Hearings Before the House Comm. on Water Power*, 65th Cong., 2d Sess., Pts. 1-4 (1918) [hereinafter *Joint Hearings*]. See J. Kerwin, *supra*, at 217-218.

The Administration bill, H.R. 8716, 65th Cong., 2d Sess. (1918), see H.R. Rep. No. 715, 65th Cong., 2d Sess. 21-29 (1918), was the first to provide for creation of a Commission, then consisting of the Secretaries of War, Interior, and Agriculture, to license hydropower projects on navigable waterways and public lands. With respect to both categories of waters, the Commission was to have authority to license projects that, in its judgment, would best serve the comprehensive development of those waters, taking account of various beneficial uses.[32] Secretary of Agriculture Houston explained the need for this federal authority as follows: "The problems are National rather than local; they transcend state lines and cannot be handled adequately except by or in conjunction with National agencies." See H.R. Rep. No. 61, 66th Cong., 1st Sess. 5 (1919).

The Administration bill contained neither the original nor the amended, broader version of Section 14 of the Ferris bill. The Water Power Committee was urged by Representative Mondell to adopt the broader version of the savings clause, but it declined to do so.[33] Instead, the Committee agreed, by an 8-7

[32] During hearings on the bill, O. C. Merrill, Chief Engineer of the Bureau of Forestry in the Department of Agriculture and a principal drafter of the Administration bill, emphasized that although a federal license would apply only to the use of water resources for power, the Commission's judgment would take account of various beneficial uses of water—*i.e.*, of "all uses that can be made of the water and of the site in that particular locality, as a unit." *Joint Hearings* at 95; see *id.* at 93-96.

[33] In the committee hearings on the administration bill, Representative Mondell advocated adoption of the broader version of the savings provision. See *Joint Hearings*, at 619-620. During colloquy on that proposal, Representative Taylor emphasized that such a savings clause reflected an intention not to infringe "covertly or otherwise * * * upon the irrigation vested rights in the State's ownership of the water on the public lands and nonnavigable streams * * *." *Id.* at 640-641. See also *id.* at 641-644. As noted, the committee's action did not conform to Representative Mondell's proposal.

vote, to the narrow version. The bill was then reported as S. 1419, 65th Cong., 2d Sess. (1918). See H.R. Rep. No. 715, 65th Cong., 2d Sess. 13, 21 (1918); 56 Cong. Rec. 9115 (1918) (remarks of Rep. Taylor). This bill passed the House, but was thwarted in the Senate by a filibuster. J. Kerwin, *supra*, at 254. Finally, a substantially identical bill, also containing the narrow version of the savings clause as its Section 27, H.R. 3184, 66th Cong., 1st Sess. (1919), was enacted in 1920.[34]

3. When viewed in its full context, this history will not bear the interpretation petitioner places upon it. What is now Section 27 of the Federal Power Act was the narrower of the two proposed savings clauses included in federal power bills between 1914 and 1920. Many of the statements relied on by petitioner

[34] Petitioner relies heavily on the floor debates on S. 1419 and H.R. 3184 (Pet. Br. 31-34), but those debates do not sustain its position. See 56 Cong. Rec. 9047-9048 (1918) (remarks of Reps. Dewalt and Sims); *id.* at 9110 (remarks of Rep. LaFollette); *id.* at 9113-9115 (remarks of Reps. Mondell, Sloan, Taylor); *id.* at 9901-9903 (remarks of Reps. Taylor, Raker); *id.* at 10,493-10,494 (remarks of Sen. Myers).

First, none of the speakers cited by petitioner came to terms with Congress's adoption of the narrow version of the savings clause, or suggested that the clause was intended to allow States to supersede the exercise of the Commission's authority under Section 10(a). Indeed, Senator Myers drew no distinction between S. 1419 and the much different bill, H.R. 408, *supra*, reported out of his committee; his suggestion that the bills were similar was simply incorrect. Second, the focus of much of the debate was on whether the Federal Power Commission would have jurisdiction to consider the effects on irrigation of a water power project, as Representative Raker advocated, but Representatives Taylor and Mondell opposed. 56 Cong. Rec. 9113-9115, 9901-9903 (1918). The latter representatives' narrow view of the Commission's function – a view totally inconsistent with the role it has since performed – and their correspondingly broad view of the authority reserved to States must be approached with caution. Moreover, as the principal proponents of a broader savings clause than Congress ultimately enacted, Representatives Mondell and Taylor cannot fairly be regarded as spokespersons for the intent of the narrower provision. Third, as petitioner acknowledges, Representative LaFollette's remarks related to Section 9(b) of the Act; referring to other evidence of his views, this Court concluded in *First Iowa* that that Section did not require compliance with State laws. See 328 U.S. at 173-174. As this Court explained in *First Iowa*, the divided authority with which Representative LaFollette was concerned was not limited to federal officials. See 56 Cong. Rec. 9810 (1918).

related to the broad version, which did not pass; others, though directed to narrow provision that was eventually adopted, were delivered by members of Congress who could not fairly be considered spokespersons for that provision. When the bill that ultimately passed was introduced, it did not contain a savings clause; Section 27 was added in committee by an 8-7 vote. Thus, contrary to the impression petitioner seeks to create, Congress was not uniformly committed to the division of authority that petitioner advocates. There were undoubtedly members of Congress who shared petitioner's vision as to the proper scheme of federal water power legislation. But the legislative history does not sustain the argument that such a scheme was enacted. In any event, nothing in this legislative history justifies the Court in abandoning *First Iowa*'s long-settled interpretation of the Federal Power Act's division of authority between the Commission and the States.[35]

II. THE CALIFORNIA WATER BOARD'S MINIMUM FLOW REQUIREMENTS DO NOT CONSTITUTE A PROPRIETARY RIGHT UNDER CALIFORNIA LAW, AND ARE INCONSISTENT WITH, AND THEREFORE PREEMPTED BY, THE COMMISSION'S EXERCISE OF LICENSING AUTHORITY

Under *First Iowa*, Section 27 preserves state laws recognizing proprietary rights in water, but "[i]n those fields where rights are not thus 'saved' to the States, Congress is willing to let the supersedure of state laws by federal legislation take its natural course." 328 U.S. at 176. Two questions are therefore presented for decision: First, does California law recognize a property right in the maintenance of in-stream water flows for the preservation of fish? If so, then the federal licensee must acquire that right, either by purchase or, where appropriate, through an

[35] As petitioner points out, the Commission took the position in its early years that compliance with state law was a condition for issuance of a federal license. Pet. Br. 35-36 n.17. However, as the reports reflect, that view was based principally, if not exclusively, on the belief that Section 9(b) required that result. That position was, of course, abandoned after *First Iowa* interpreted Section 9(b) in a contrary manner, and petitioner does not contend otherwise.

exercise of the power of eminent domain. Second, if the in-stream flow requirements established by the State Water Resources Control Board for this project do not reflect proprietary rights, are they inconsistent with the conditions set forth in the FERC license? If there is no conflict, then "they remain as applicable and effective as they were before [the] passage" of the Federal Power Act. 328 U.S. at 178. But because "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room for conflicting state controls" (*id.* at 181), any state standards that are inconsistent with FERC's exercise of its authority under Section 10(a) of the Federal Power Act are preempted.

A. California Does Not Recognize A Property Right To In-Stream Flows For The Purpose Of Protecting Fish

Under California law, the use of water for the preservation of fish is recognized to be a beneficial use. Cal. Water Code §§ 1243, 1257 (West 1971); see *id.* § 1257.5 (Supp. 1989). The California courts have held, however, that the State will not grant a permit or a license reflecting a right to the maintenance of in-stream flows for that purpose. *Fullerton* v. *California State Water Resources Board*, 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1979); *California Trout, Inc.* v. *State Water Resources Control Board*, 90 Cal. App. 3d 816, 153 Cal. Rptr. 672 (1979). The recognition of such a right is foreclosed by a state rule requiring an act of appropriation or diversion of water as an element of an appropriative water right. See *In re Water of Hallett Creek Stream System*, 44 Cal. 3d 448, 454-455 n.2, 749 P.2d 324, 325 n.2, 243 Cal. Rptr. 887, 889 n.2 (1988). The refusal to recognize a right to the maintenance of in-stream flows for fish protection is also necessary, one court has stated, to avoid "[tying] the Board's hands as to future uses." *Fullerton*, 90 Cal. App. 3d at 604, 153 Cal. Rptr. at 528.[36]

[36] Other States have created water rights entitling the owner to the maintenance of continued flows. See *Fullerton*, 90 Cal. App. 3d at 601 n.13 153 Cal. Rptr. at 526 n.13.

Petitioner does not contend that the in-stream flow requirements established by the State Water Board reflect a recognized proprietary right within the meaning of *First Iowa*. Consequently, those in-stream flow requirements cannot be said to create or to protect proprietary water rights protected by Section 27; instead, they represent regulation of the use of water. As such, they are not among the state rights preserved from preemption by the Federal Power Act's savings clause.

B. California's In-Stream Flow Requirement Conflicts With The Federal License And Is Thus Superseded

The dispositive question, therefore, is whether the State Water Board's decision to establish in-stream flow rates higher than those established FERC's license conflicts with the Commission's exercise of its authority under Section 10(a) of the Federal Power Act. It is well established that any assertion of regulatory authority by a State is invalid under the Supremacy Clause if it

> actually conflicts with federal law, that is, [if] it is impossible to comply with both state and federal law, * * * or [if] the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Accord, *e.g.*, *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 581 (1987); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Here, a clear conflict exists between the in-stream flow conditions contained in the FERC license and the state water permit; as a result the federal requirement is controlling under the Supremacy Clause.

1. Contrary to petitioner's contention (Pet. Br. 48-49), in-stream flow requirements established by FERC are not merely " 'minimum' requirements" that leave room for States to impose more stringent standards. Rather, as the Commission explained (Pet. App. A29 (footnotes omitted)):

> [T]he imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Com-

mission's comprehensive planning and licensing process under Section 10(a). In considering and balancing all aspects of the public interest as we are required to by Section 10(a) in determining whether, and under what conditions, a license should issue, we must balance, *inter alia*, the need to protect environmental interests with the need for the power to be produced by the projects. In so doing, we prescribe conditions, such as those relating to minimum flow releases, that we believe will provide the appropriate level of environmental protection and energy generation and will not issue a license if the conditions we deem necessary to protect environmental resources would render a project economically infeasible.

Interpreting Section 27 as granting to the states the authority to prescribe minimum flow releases for projects, as advocated by WRCB, would render meaningless our comprehensive planning authority and responsibility under Section 10(a). After having carefully balanced competing considerations and issued a license with conditions effectuating the balance we have struck pursuant to Section 10(a), our balancing could be undone by minimum flow or other water-related conditions imposed by a state.

This explanation of the purpose of the in-stream flow condition in the Commission's license is entirely consistent with the language of the statute and this Court's decisions.[37] The Commission's assessment of the purpose of its license and the effect of the State's conflicting assertion of its authority is entitled to deference from this Court. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. at 714-715, 720-722.

Under the circumstances of this case, there can no doubt that the Water Control Board's effort to raise the minimum flow requirements conflicts with the federal Commission's judgment about the appropriate conditions that should attach to the proposed project. Indeed, the Partnership has argued that compliance with the Water Control Board's in-stream flow re-

[37] See *First Iowa*, 328 U.S. at 167-168; *Pacific Gas & Elec. Co* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 223 n.34 (1983).

quirements would render the project economically infeasible. Pet. App. A17. Petitioner's suggestion that it is theoretically possible to comply with both standards at the same time and that no conflict can be found unless the State Board denies a water permit altogether (Pet. Br. 48-49) simply ignores the fact that the higher in-stream flow requirements reduce the amount of water available to generate power and thus undercut the Commission's affirmative judgment as to the best means of developing the hydropower resources at issue. As the Ninth Circuit succinctly stated, the imposition on the Partnership of flow rates that are materially higher than those prescribed in a Commission license "would, in essence create a different type of hydropower project from the one described in the license" and would in effect "constitute a veto of the project that was approved and licensed by FERC." Pet. App. A12.

Petitioner marshals a number of cases in which, it maintains, this Court has approved "concurrent federal and state jurisdiction over activities that affect both national and state interests" (Pet. Br. 40-41 & n.22) or "dual systems" (*id.* at 41). However, these abstract formulations should not be allowed to obscure the real differences between those cases and this one—in terms of the extent of the asserted preemptive effect of federal law, the nature of the claimed conflict, and the purposes the respective laws served. For example, in two of the cases petitioner relies upon, *Cummings* v. *Chicago*, 188 U.S. 410 (1903), and *California Coastal Comm'n* v. *Granite Rock Co., supra*, the Court held only that parties were not relieved entirely from state permit requirements when undertaking federally licensed activities; neither case suggests that a state agency may impose conditions in a permit that effectively nullify the activity approved by the federal license. See 480 U.S. at 593-594.[38]

[38] The other cases that petitioner cites (Pet. Br. 41 n.22) involved federal licensing requirements whose purpose was narrower than that of the Federal Power Act, situations in which the state and federal statutes addressed separate concerns, an insufficient showing of actual conflict between state and federal statutes, or some combination of those factors. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. at 720-721 (no factual showing of inconsistency between state and federal requirements regarding blood plasma); *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. at 211-212 (under Atomic

As the Court has stated, a State "may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress." *Sperry* v. *Florida*, 373 U.S. 379, 385 (1963). When it characterized the Commission's in-stream flow requirements as a mere proposal (see J.A. 59), the Water Control Board purported to exercise "a virtual power of review" over the Commission, and it imposed additional, inconsistent requirements on top of those in the federal license. It is clear that the conditions the state board has imposed interfere with the exercise of authority delegated by Congress to the Commission. See *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 155 (1982) (though compliance with federal and state requirements was not impossible, state regulation was nevertheless preempted where it deprived banks of flexibility conferred by federal regulation).

2. Petitioner also contends that giving primacy to FERC's conditions would unduly undercut the States' interests in the comprehensive management of their water resources by "creat[ing] two bodies of law in the same river" and empowering FERC to act as "a super water rights agency." Pet. Br. 43-47. These arguments are overstated and, in the final analysis, are foreclosed by the Federal Power Act.

Energy Act, federal government maintains complete control over safety and nuclear aspects of nuclear plants, reserving to states other issues); *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 337 (1973) (Water Quality Improvement Act expressly authorizes States to establish higher safety equipment regulations than those prescribed by the Act); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 147-148 (1963) (federal regulation established only minimum standard); *Kake* v. *Egan*, 369 U.S. 60, 63 (1962) (noting the limited purpose of the federal permits for fish traps); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 445 (1960) (thrust of federal law was perils of maritime navigation, whereas local ordinance was designed to protect health and cleanliness of local community); *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, 207 (1944) ("limited and defined control which federal authority has thus far seen fit to assert over customshouse brokers" left room for state foreign corporation law).

As the Commission has often made clear, its authority is limited to authorizing the "use" of water for hydropower projects.[39] Significantly, as in this case, hydropower projects often do not deplete the quantity of water available for other uses. To be sure, hydropower projects can involve the impoundment, release, or diversion of water in ways that affect other uses of water resources. But to the extent that a federal hydropower project will interfere with water rights recognized under state law, Section 27 requires that the licensee acquire or condemn the rights affected. And FERC has no mandate to regulate water uses except insofar as they pertain to a proposed power generation project.

Moreover, when the Commission does undertake to review a proposed water power project, it is expressly directed by Section 10(a) to give careful consideration to all existing and potential beneficial uses of water. It is thus inappropriate to assume, as petitioner does, that the Commission is insensitive to the nature or needs of state water systems. In ECPA, Congress has established a procedural framework calculated to foster that approach. Consequently, there is no support for the suggestion that the Commission is bent on constituting itself a "super water rights agency," issuing "a body of FERC-created [water] law," or upsetting a State's "policy judgments concerning its economic and social order." Pet. Br. 44, 45, 47.

Nevertheless, when all is said and done, there remains the possibility that the Commission and state agencies will reach inconsistent judgments about the advisability or scope of a proposed hydropower project. As in *First Iowa*, state legislatures may enact statutes that forbid development that the Commission determines to be in the national interest. Alternatively, state water agencies and the Commission may weigh the same factors differently, or they may be charged under their respective statutes with assessing different factors. In those cases, the Federal Power Act specifies that the Commission's determina-

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[39] See *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 782 (1984); *Rumford Falls Power Co.*, 36 F.P.C. 605, 607 (1966); *Rumford Falls Power Co.*, 34 F.P.C. 27, 29 n.4 (1965), rev'd on other grounds, 355 F.2d 683 (1st Cir. 1966); *Seneca Nation of Indians*, 6 F.P.C. 1025, 1026 (1947); *East Bay Municipal Utility District*, 1 F.P.C. 12 (1932).

tions are to prevail. Congress could have, but did not, leave the direction of hydropower development to the States. Instead, it charged the Commission with the ultimate authority to consider and reconcile "those uses of the Nation's water resources in which the Federal Government ha[s] a legitimate interest." *FPC* v. *Union Electric Co.*, 381 U.S. at 98. Petitioner's competing vision of the appropriate division of federal and state authority should be addressed to Congress, not the courts.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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STATUTORY APPENDIX

Sections 4(a), 4(e)-(f), 6, 7, 9(a)(2) [previously 9(b)], 10(a), 10(g), 10(j), 21, and 27 of The Federal Power Act of 1935, as amended, 16 U.S.C. 797(a), 797(e)-(f), 799, 800, 802(a)(1), 803(a), 803(g), 803(j), 814, 821, provide in pertinent part as follows:

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter. * * *

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement

of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until

two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. *In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.*[1]

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however,* That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

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[1] Emphasis added to language added by the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243.

§ 799. License; duration, conditions, revocation, alteration, or surrender

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licenseee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this subchapter and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of title 41.

§ 800. Issuance of preliminary permits or licenses

(a) Preference

In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adopted, or shall within a reasonable time to be fixed by the Commission be made equally well adopted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest

the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Development of water resources by United States; reports

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

(c) Assumption of project by United States after expiration of license.

Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

§ 802. Information to accompany application for license; landowner notification

(a) Each applicant for a license under this chapter shall submit to the commission—

(2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the

State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.[2]

§ 803. Conditions of license generally[3]

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, *for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat)*, and for other beneficial public uses, including *irrigation, flood control, water supply, and* recreational *and other* purposes *referred to in section 797(e) of this title* [*sic*] if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan de-

[2] Previously 16 U.S.C. 802(b) (1982).

[3] Emphasis added to language added by the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243.

scribed in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license. * * *

(g) Conditions in discretion of commission

Such other conditions not inconsistent with the provisions of this chapter as the commission may require. * * *

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and

statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) of this section shall not apply to the conditions required under this subsection.

§ 814. Exercise by licensee of power of eminent domain

When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with any improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts

of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

§ 821. State laws and water rights unaffected

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

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